exchange [25] does not render them conditional or non-negotiable, and alters in no way the general principle that after acceptance or payment the loss from forgery or other defects in the collateral falls on the drawee or buyer.[26]

The great losses caused by the Knight, Yancey and Company frauds have led to some steps toward the establishment of a validation bureau at which bankers can present collateral cotton bills of lading and have the agents' signatures checked by the railroads. It has also been suggested that surety companies guarantee the genuineness of the documents.[27] In some such way it may be possible to protect all parties from loss.

PROPERTY IN NEWS. — Courts too often formulate a rule which is exclusive as well as inclusive and which tends to become a rigid guide for the future. Then begins the process of puncturing the inadequate rule with exceptions, new rules, until finally the light shines clear through the old doctrine and a principle takes its place.[1] The United States Supreme Court, in the recent case of *International News Service* v. *The Associated Press*,[2] has gone a long way toward establishing as law the principle that no one shall be permitted to appropriate to himself the fruits of another's labor.

This proposition would seem to carry conviction in its mere statement. Property rights in tangible objects are, of course, universally protected. There is discernible in the cases, however, a tendency to distinguish between values inhering in some palpable form which can be physically dominated and values of a less tangible character; and this, although the latter may have cost vast sums and, given legal protection, have vast

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[25] See page 561, *ante*, and note 2.

[26] In accord with Guaranty *v.* Hannay, *supra*, note 15, are Springs *v.* Hanover and Varney *v.* Monroe, *supra*, note 14, and Bank of Guntersville *v.* Jones, 156 Ala. 525, 46 So. 971 (1908) (goods subject to landlord's lien); Woddell *v.* Hanover, 48 N. Y. Misc. 578, 97 N. Y. Supp. 305 (1905) — no goods shipped (not a bill of lading case); 18 Col. L. Rev. 480. *Contra*, La Fayette *v.* Merchants' Bank, 73 Ark. 561, 84 S. W. 700 (1905) (forged bill of sale on back of draft); and *dicta* in Hoffman *v.* Bank, 12 Wall. (U. S.) 181, 189, 190 (1870), and Guaranty *v.* Grotrian, note 18, *supra*.

[27] 27 BANKING L. J., 763, 937; 28 *Ibid.*, 450, 710, 787.

[1] *E. g.*, contrast the able opinions of Sanborn, Circuit Judge, in Huset *v.* J. I. Case Threshing Machine Co., 120 Fed. 865, 57 C. C. A. 237 (1903), and of Cardozo, J., in MacPherson *v.* Buick Motor Co., 217 N. Y. 382, 111 N. E. 1050 (1916).

[2] U. S. Sup. Ct., December 23 (October Term, No. 221), 1918. The court granted an injunction against, *inter alia*, the taking of news from early editions of complainant's newspapers and from its bulletin boards and selling it to defendant's customers, until after its news value had disappeared. The court treated the case as one of unfair competition, speaking of a limited or *quasi*-property in news. Mr. Justice Holmes dissented in part; he took the ground that there are some values which the law does not protect, including that in gathered news, but he was of the opinion that this was a converse case of "passing off," where the defendant passed off another's goods as his own, and that an injunction might be granted against the use of news gathered by the complainant without giving credit. Mr. Justice Brandeis, in dissenting, admitted the propriety of some remedy; he argued that the granting of relief would require the making of a new rule, and without denying the court's right to make new rules on the analogy of old ones in order to cope with a new wrong, he maintained that, there being probably a public interest involved, legislatures could best deal with the problem.

possibilities of realization.[3] On the other hand, there has been a growing recognition that such values deserve better treatment at the hands of the courts. Thus the infliction of harm on another through the exercise of a right otherwise legal, when the reason for such exercise was malice, has been declared a wrong.[4] The taking away of another's customers, although only the usual means of competition were used, has been held actionable when the motive was not the continued prosecution of a competing enterprise but destruction of the plaintiff's business.[5] It was not, indeed, until the nineteenth century that there was general recognition that "passing off" one's goods as those of another by means of similarity of marks and names is a tort.[6] The law of unfair competition has grown with the growth of printing and transportation and the consequent increase of values based upon reputation.[7] This in itself is a strong argument against the view that a limited or *quasi*-property in news cannot be recognized for lack of a close analogy in previous cases. It is submitted that many or most of the cases where such values have not been protected from appropriation may be explained on the ground of social policy, and that this is the test which should be applied.[8]

The common law secured to an author the right of first publication.[9] But once he had "dedicated his work to the public" it was held that duplication in competition with him was permissible.[10] The public interest in the discovery of truth requires that one's right of property in his mind-creations come to an end at some point. Society will eventually demand that another be allowed to appropriate these values. The common law, however, drew its arbitrary line too close. That this was felt by the judges is indicated by the decisions, some of which go a long way, holding that a private circulation of a writing, the oral delivery of a lecture, or even a series of public performances of a play or opera, does not constitute a dedication to the public.[11] Subsequent legislators recognized the counter-policy that industry and invention must be stimulated by a greater legal protection to its fruits.

There are numerous instances where on public grounds profiting by another's labor is permitted. One whose activities form the subject-

[3] Brown Chemical Co. *v.* Meyer, 139 U. S. 540 (1891); Canal Co. *v.* Clark, 13 Wall. (U. S.) 311 (1871); Borden Ice Cream Co. *v.* Borden Condensed Milk Co., 201 Fed. 510 (1912); Dunston *v.* Los Angeles Van, etc. Co., 165 Cal. 89, 131 Pac. 115 (1913); Westminster Laundry Co. *v.* Hesse Envelope Co., 174 Mo. App. 238, 156 S. W. 767 (1913).

[4] Flaherty *v.* Moran, 81 Mich. 52, 45 N. W. 381 (1890); Norton *v.* Randolph, 176 Ala. 381, 58 So. 283 (1912); Wilson *v.* Irwin, 144 Ky. 311, 138 S. W. 373 (1911).

[5] Tuttle *v.* Buck, 107 Minn. 145, 119 N. W. 946 (1909); Dunshee *v.* Standard Oil Co., 152 Iowa, 618, 132 N. W. 371 (1911).

[6] See Lawrence Mfg. Co. *v.* Tennessee Mfg. Co., 138 U. S. 537 (1891). See also HOPKINS, TRADEMARKS, TRADENAMES, AND UNFAIR COMPETITION, 3 ed., § 20.

[7] See HOPKINS, TRADEMARKS AND UNFAIR COMPETITION, *supra*, §§ 19–20.

[8] See the opinions in Plant *v.* Woods, 176 Mass. 492, 57 N. E. 1011 (1900). See also Wyman, "Competition and the Law," 15 HARV. L. REV. 427, and Jeremiah Smith, "Crucial Issues in Labor Litigation," 20 HARV. L. REV. 253, 345, 429.

[9] Prince Albert *v.* Strange, 2 De G. & Sm. 652 (1848); Kiernan *v.* Manhattan Telegraph Co., 50 How. Pr. (N. Y.) 194 (1876).

[10] Wagner *v.* Conried, 125 Fed. 798 (1903); Jewelers' Agency *v.* Jewelers' Publishing Co., 155 N. Y. 241, 49 N. E. 872 (1898).

[11] Boucicault *v.* Fox, 5 Blatchf. 87, Fed. Case, No. 1, 691 (1862); Aronson *v.* Baker, 43 N. J. Eq. 365, 12 Atl. 177 (1887); Universal Film Co. *v.* Copperman, 218 Fed. 577,

matter of news has not the sole right of making it public,[12] unless, through contracts or other property rights, he can control the sources of information. Facts must be open to all who can fairly learn them, but equity will not permit them to be discovered by means of breaches of contract or of confidence.[13] Again, one who makes a site or a city an especially advantageous place for the production of a particular commodity, cannot, as Mr. Justice Brandeis points out, prevent others from engaging in the same business in the same locality and thus profiting by the industry of the pioneer.[14] The economic needs of society require that no such shackles be put upon the development of its resources. One may copy exactly the unpatented or uncopyrighted work of another.[15] Here again the gain to the public from competition under the existing economic order is paramount.

In spite of certain language in some of the cases,[16] it is conceded that there is no absolute property in news. These cases, as Mr. Brandeis points out, involved breaches of contract or of confidence. The question seems to be, Is a few hours' delay in the transmission of news to certain quarters of such importance that to prevent such delay public policy requires that the law permit appropriation of news gathered by others? *Per contra*, it is doubtful whether the enormous expense and labor of gathering news from every part of the earth will be continued without legal protection to the product.

The dissenting opinion points to the evils which might arise from a failure of certain communities or newspapers to receive the news gathered by a powerful organization and refers the problem to the legislature. If, however, there is deemed to be a serious public interest involved, we are still not obliged to allow appropriation; the courts can very well deal with the situation on principles of public utility law. Either the shutting off of the correspondents of competitors from the sources of news,[17] or the great outlay required to maintain a news-gathering agency, may result in a virtual monopoly.[18] Illinois has so held.[19] The association

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134 C. C. A. 305 (1914); Thomas *v.* Lennon, 14 Fed. 849 (1883); Caird *v.* Sime, 12 A. C. 326 (1887).

[12] Sports and General Press Agency, Ltd. *v.* "Our Dogs" Publishing Co. Ltd., [1916] 2 K. B. 880, cited by Mr. Justice Brandeis.

[13] Morison *v.* Moat, 9 Hare, 241 (1851); Board of Trade *v.* Christie Grain & Stock Co., 198 U. S. 236 (1905); F. W. Dodge Co. *v.* Construction Information Co., 183 Mass. 62, 66 N. E. 204 (1903).

[14] Elgin National Watch Co. *v.* Illinois Watch Co., 179 U. S. 665 (1901). But where a geographical name has acquired a special trade significance, passing off by means of the use of this name will not be permitted. Wolf Bros. & Co. *v.* Hamilton-Brown Shoe Co., 165 Fed. 413 (1908); French Republic *v.* Saratoga Vichy Co., 191 U. S. 427 (1903).

[15] Saxlehner *v.* Wagner, 216 U. S. 375 (1910); Elaterite Paint & Mfg. Co. *v.* S. E. Frost Co., 105 Minn. 239, 117 N. W. 388 (1908); Gendell *v.* Orr, 13 Phila. (Pa.) 191 (1879).

[16] See Western Union Telegraph Co. *v.* Foster, 224 Mass. 365, 369, 113 N. E. 192, 194 (1916); Cleveland Telegraph Co. *v.* Stone, 105 Fed. 794, 795 (1900).

[17] For example, it seems in the principal case that the allied governments prohibited the correspondents of the International News Service from obtaining news in their respective countries and from using the cable and telegraph lines therefrom.

[18] See WYMAN, PUBLIC SERVICE CORPORATIONS, §§ 120–56, especially §§ 138 and 156.

[19] Inter-Ocean Publishing Co. *v.* Associated Press, 184 Ill. 438, 56 N. E. 822 (1900);

which has a *quasi*-monopoly in news may be compelled to furnish its product to consumers including communities which have no newspapers belonging to such association, at reasonable rates.[20] The constitutional guaranty of freedom of the press would protect news against too close public control. Mr. Justice Brandeis fears that the courts are not equipped to deal with the problem in all its aspects. But, although public services are often best regulated by administrative bodies, the courts have not for that reason denied the relief at their disposal pending the inauguration of such bodies.[21]

TRESPASS BY AIRPLANE. — The rapid approach of the airplane as an instrumentality of commerce presents the occasion for defining more precisely the doctrine of the ownership of the air space, as embodied in Coke's maxim, *cujus est solum, ejus usque ad coelum*.[1] Examining first the cases which involve interferences with the column of air by encroachments from adjoining lands, we find that not only is the subjacent landowner permitted to cut away as nuisances overhanging shrubbery and projecting cornices,[2] but in some states he may resort to an action in ejectment.[3] That the encroaching landowner is liable also for all foreseeable damage is settled;[4] but whether there is a cause of action

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New York & Chicago Grain & Stock Exchange *v.* Board of Trade, 127 Ill. 153, 19 N. E. 855 (1889); News Publishing Co. *v.* Associated Press, 114 Ill. App. 241 (1904); News Publishing Co. *v.* Associated Press, 190 Ill. App. 77 (1914). See also Friedman *v.* Telegraph Co., 32 Hun (N. Y.) 4 (1884); Smith *v.* Telegraph Co., 42 Hun (N. Y.) 454 (1886). See *contra*, State *v.* Associated Press, 159 Mo. 410, 60 S. W. 91 (1901); Matthews *v.* Associated Press, 136 N. Y. 333, 32 N. E. 981 (1893); Metropolitan Grain & Stock Exchange *v.* Board of Trade, 15 Fed. 847 (1883).

[20] Inter-Ocean Publishing Co. *v.* Associated Press, *supra;* Moore *v.* Southern Railway Co., 136 Ga. 872, 72 S. E. 403 (1911).

[21] Allnutt *v.* Inglis, 12 East, 527 (1810); Shepard *v.* Gold & Stock Telegraph Co., 38 Hun (N. Y.) 338 (1885); Western Union Telegraph Co. *v.* State, 165 Ind. 492, 76 N. E. 100 (1905).

[1] COKE ON LITT., § 4*a*.

[2] Penruddock's Case, 5 Coke Rep. 100 (1598); Baten's Case, 9 Coke Rep. 53 (1611); Lemmon *v.* Webb, [1895] A. C. 1; Smith *v.* Giddy, [1904] 2 K. B. 448; Wandsworth Board of Works *v.* United Telephone Co., 13 Q. B. D. 904, 927 (1884); Codman *v.* Evans, 7 Allen (Mass.), 431 (1863); Aiken *v.* Benedict, 39 Barb. (N. Y.) 400, 402 (1863); McCourt *v.* Eckstein, 22 Wis. 153, 158 (1867); Meyer *v.* Metzler, 51 Cal. 142 (1875); Lawrence *v.* Hough, 35 N. J. Eq. 371 (1882); Grandona *v.* Lovdal, 70 Cal. 161, 11 Pac. 623 (1886); Lyle *v.* Little, 83 Hun (N. Y.), 532, 33 N. Y. Supp. 8 (1895); Tanner *v.* Wallbrunn, 77 Mo. App. 262, 265 (1898); Norwalk Heating & Lighting Co. *v.* Vernam, 75 Conn. 662, 664, 55 Atl. 168 (1903); Harndon *v.* Stultz, 124 Iowa, 440, 100 N. W. 329 (1904); Huber *v.* Stark, 124 Wis. 359, 102 N. W. 12 (1905); Hazle *v.* Turner, 2 Sess. (Scotland) 886 (1840); see also Crocker *v.* Manhattan Life Ins. Co., 61 App. Div. 226, 70 N. Y. Supp. 492 (1901) (swinging shutters).

[3] Murphy *v.* Bolger, 60 Vt. 723, 15 Atl. 365 (1888); McCourt *v.* Eckstein, 22 Wis. 153 (1867); Beck *v.* Ashland Cigar & Tobacco Co., 146 Wis. 324, 130 N. W. 464 (1911); Butler *v.* Frontier Telephone Co., 186 N. Y. 486, 79 N. E. 716 (1906) (telephone wires not touching any part of the land). *Cf.* Rasch *v.* Noth, 99 Wis. 285, 74 N. W. 820 (1898); Huber *v.* Stark, 124 Wis. 359, 362, 102 N. W. 12 (1905). *Contra*, Wilmarth *v.* Woodcock, 58 Mich. 482, 486, 25 N. W. 475 (1885); Norwalk Heating & Lighting Co. *v.* Vernam, 75 Conn. 662, 664, 55 Atl. 168 (1903). See 16 YALE L. J. 275.

[4] Pickering *v.* Rudd, 4 Camp. 219, 221 (1815); Fay *v.* Prentice, 1 C. B. 828 (1845) (depreciation in the value of the land); Smith *v.* Giddy, [1904] 2 K. B. 448; Langfeldt *v.* McGrath, 33 Ill. App. 158 (1889); Barnes *v.* Berendes, 139 Cal. 32, 72 Pac. 406